No. 05-35264

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANCHERS CATTLEMEN ACTION LEGAL FUND,
UNITED STOCKGROWERS OF AMERICA,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ANIMAL AND PLANT HEALTH INSPECTION SERVICE, *et al.*,

Defendants-Appellants.

On Appeal From the United States District Court
for the District of Montana, No. CV-05-06-BLG-RFC

BRIEF *AMICUS CURIAE* OF ALBERTA BEEF PRODUCERS IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL OF THE DISTRICT COURT ORDER GRANTING A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

TABLE OF AUTHORITIES — Continued

Page(s)

International Agreements

Miscellaneous

INTEREST OF *AMICUS CURIAE*

On January 4, 2005, the United States Department of Agriculture (USDA) issued a Final Rule, "Bovine Spongiform Encephalopathy [BSE]; Minimal Risk Regions and Importation of Commodities," 70 Fed. Reg. 460 (Jan. 4, 2005). The Final Rule, which was to take effect on March 7, 2005, partially lifted the prohibition on the importation of Canadian cattle, which USDA had imposed in 2003 based on the discovery in Canada of one animal infected with BSE. On the motion of Ranchers Cattlemen Action Legal Fund, United Stock Growers of America (R-CALF), the U.S. District Court for the District of Montana enjoined the implementation of the Final Rule. *Ranchers Cattlemen Action Legal Fund, United Stock Growers of Am. v. USDA*, 359 F. Supp. 2d 1058 (D. Mt. 2005). (Specific page citations in 359 F. Supp. 2d are unavailable as of the date of this filing; accordingly, the district court's opinion is cited as "Op. at __.")

Alberta Beef Producers (ABP) is a membership organization of some 28,000 cattle producers in the Province of Alberta, who collectively account for approximately half of all the cattle raised in Canada. The livelihood of ABP's members hinges on the outcome of this case.

The district court's injunction has caused severe injury to the cattle producers represented by ABP. For example, the injunction has prevented ABP members from resuming their longstanding commercial relationships with

customers in the U.S. In anticipation of the Final Rule's implementation, ABP members entered into contracts with U.S. purchasers to sell Alberta cattle. The preliminary injunction makes it impossible to fulfill those contracts, and forces ABP members to find an outlet for their cattle — at reduced prices — in the limited Canadian market.

Furthermore, the injunction directly impugns the safety of the cattle that ABP members produce. The district court's determination that Canadian producers are incapable of protecting their cattle from BSE and are incapable of protecting those who eat Canadian beef products from fatal illness tarnishes the reputation of ABP products not only in the U.S. but throughout the world.

Although ABP thus has much at stake in this litigation, its interests are not represented in this court by either the appellants or the appellee. USDA is not charged by law with representing the interest of non-U.S. producers. ABP's members compete with the members of R-CALF. Accordingly, only by participating in this proceeding as *amicus curiae* can ABP protect its vital interests and share its unique perspective with this Court.

INTRODUCTION

The district court granted R-CALF's application for a preliminary injunction after determining that R-CALF was likely to succeed on the merits of its claim and that it, and the U.S. public at large, would suffer "irreversible" hardship if the court

permitted the implementation of the Final Rule. Op. at 24-27. The court characterized the dangers of implementation in apocalyptic terms, opining that Canadian cattle posed a "catastrophic risk" to the American public. *Id.* at 11. Quoting a brief filed by several state government *amici* in support of R-CALF (the only *amici* that the court permitted to participate), the court determined that an injunction was warranted because "[t]he threats are great. Delay is prudent and largely harmless." *Id.* at 27 (internal quotation marks omitted).

This conclusion is seriously flawed. ABP agrees fully with USDA that the district court failed to accord appropriate judicial deference to USDA's expertise as reflected in the Final Rule, Appellant USDA's Brief, Case No. 05-35264, at 20-22 (9th Cir. Apr. 14, 2005). ABP focuses here, however, on three assumptions made by the district court, each of which is legally erroneous and each of which compels the reversal of the preliminary injunction.

First, the district court's assessment of R-CALF's likelihood of success on the merits was premised on an erroneous view of USDA's authority under the Animal Health Protection Act (AHPA), 7 U.S.C. §§ 8301 *et seq.* Contrary to the district court's assumption, AHPA does not require that USDA prohibit the introduction of cattle into the U.S. unless it can be established that such a prohibition is unnecessary to protect the health and welfare of people and animals in the U.S. Rather, AHPA's mandate is just the opposite: USDA may place

restrictions on imports only to the extent *necessary* to protect American health and welfare. *Id.* at § 8303(a)(1). The district court simply overlooked the statutory presumption that U.S. borders must remain open unless their closure is necessary.

Second, the district court presumed that there would be a cataclysmic effect on the health of U.S. citizens and the wallets of U.S. cattle producers if the Final Rule were implemented. These unfounded speculations, however, conflict with the record scientific evidence and with the record experience of cattle producers in the U.S.

Third, the district court casually assumed, without analysis, that its preliminary injunction would inflict no harm on the public interest. The court did not consider, for example, the adverse health effects to the American public from the higher beef prices that result from the constriction in the cattle supply to the U.S. market. Nor did the court consider that its injunction would disrupt the international efforts of the U.S. to forge a consensus in favor of scientifically sound and globally consistent BSE standards. Nor did the court consider that its injunction would give support to the barriers against U.S. beef products that several major foreign markets have put in place, barriers that the U.S. has been working intensively to remove.

In short, because the district court's analysis of the criteria for granting a preliminary injunction were based on erroneous premises, this Court should reverse the order of injunction.

ARGUMENT

I. THE DISTRICT COURT MISCALCULATED R-CALF'S LIKELIHOOD OF SUCCESS ON THE MERITS BY OVERLOOKING THE LIMITED STATUTORY AUTHORITY OF USDA TO RESTRICT IMPORTS

As a predicate to issuing its preliminary injunction, the district court determined that R-CALF would be likely to prevail on the merits. In so doing, the court repeatedly cited USDA's responsibility to protect the health and welfare of the people of the U.S., Op. at 8, 10, 11, 26 (citing 7 U.S.C. § 8301(5)(B)(iii)), and criticized USDA for failing to fulfill this "statutory mandate." Op. at 10.

The district court ignored, however, the specific statutory authority of USDA to restrict imports. That authority is expressly limited: AHPA directs that "the importation or entry of any animal" may be restricted if that restriction "is *necessary* to prevent the introduction into or dissemination within the United States of any pest or disease of livestock." 7 U.S.C. § 8303(a)(1) (emphasis added). Thus, the "statutory mandate" of USDA calls for restrictions only to the extent "necessary"; a restriction that is not necessary is not lawful. *See id.* at § 8303(b)(1) ("Secretary [of Agriculture] may issue such orders and promulgate such regulations as are necessary to carry out [Section 8303(a)].").

Throughout its analysis of the Final Rule, the district court appears to assume that AHPA expresses a congressional preference for international borders to be closed to trade in cattle and associated products unless such closure is *unnecessary*. *See, e.g.*, Op. at 26 (stating that AHPA mandate justifies elimination of "any exposure" to "potentially contaminated Canadian beef"). To the contrary, the congressional preference expressed through AHPA is that international borders be open except to the extent that closure is *necessary*. The district court, in effect, viewed the statutory presumption upside down throughout its consideration of R-CALF's likelihood of success on the merits.

AHPA's directive that only necessary border restrictions are lawful is consistent with the international obligations of the U.S. *See* 70 Fed. Reg. at 534. Both the North American Free Trade Agreement (NAFTA) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) require that USDA impose trade restrictions that are based on sound science and that are no more restrictive in scope or duration than necessary. NAFTA, for example, expressly requires that the U.S. maintain or apply sanitary (*i.e.*, health) measures such as the Final Rule "only to the extent necessary" to achieve an "appropriate level of protection," NAFTA, Part 2, Chapter 7, Article 712.5, *available at* http://www.dfait-maeci.gc.ca/nafta-alena/ (last viewed April 21, 2005), and that such measures be "based on scientific principles" and "risk assessment" and not be

maintained "where there is no longer a scientific basis" for the measures, *id.* at Article 712.3. Furthermore, the U.S. may not maintain or apply sanitary measures that discriminate between like U.S. beef cattle and Canadian beef cattle. *See id.* at Article 712.4.

Similarly, the SPS Agreement, to which the U.S. agreed in 1994 as part of its World Trade Organization obligations, requires that U.S. sanitary measures be applied "only to the extent necessary" to protect human, animal, or plant life or health and "not [be] maintained without sufficient scientific evidence." SPS Agreement, Article 2.2, *available at* http:// www.wto.org/english/ docs_e/legal_e/ssps_01_e.htm (last viewed April 21, 2005). Furthermore, the U.S. may not apply its sanitary measures "in a manner which would constitute a disguised restriction on international trade." *Id.* at Article 2.3.

Thus, the mandate of AHPA and the international obligations of the U.S. are entirely consistent in authorizing import restrictions only to the extent necessary to safeguard health and welfare. In any event, under well-established principles of U.S. law, AHPA should have been construed by the district court so as to comport with the international legal obligations of the U.S. if at all possible. *See, e.g., Weinberger v. Rossi,* 456 U.S. 25 (1982) (construing U.S. statute prohibiting employment discrimination against U.S. citizens by the military so as not to abrogate executive agreements); *McCulloch v. Sociedad Nacional de Marineros de*

Honduras, 372 U.S. 10, 21 (1963) (construing U.S. labor law so as not to violate customary international rules of maritime jurisdiction); *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

In sum, the mandate that USDA must fulfill through the Final Rule is to maintain open borders to Canadian cattle except to the extent necessary to protect the welfare of the American people. Insofar as the district court misconceived this mandate, and believed that the statutory presumption in favor of open borders was actually a statutory presumption against them, its calculation of the likelihood of R-CALF's success on the merits was fatally flawed.

II. THE DISTRICT COURT OVERSTATED THE HARM OF IMPLEMENTING THE FINAL RULE

In balancing the hardships between the parties, the district court exaggerated both the risk to human health posed by the Final Rule and the harm to the U.S. cattle industry that the Final Rule might cause.[1] Consequently, the court's determination that a preliminary injunction was justified was erroneous as a matter of law.

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[1] We note, as did USDA in its brief, that R-CALF had no standing to complain about alleged risks to the public health, because its organizational mission is limited to promoting the economic health of cattle ranchers. Appellant USDA's Brief, Case No. 05-35264 (9th Cir. Apr. 14, 2005), at 47-48.

A. The District Court Overstated The Risk To Human Health From Canadian-Sourced Cattle.

The district court concluded that the Final Rule's limited reopening of the border to Canadian cattle under 30 months of age would make it "a virtual certainty that Canadian cattle infected with BSE would be imported into the U.S.," and that such importation would cause "a potentially catastrophic risk of danger to the beef consumers in the U.S." Op. at 11. Neither conclusion finds support in the record.

First, the district court extrapolated from the discovery of BSE in four Canadian-origin cattle between 2003 and 2005, to the determination that renewed importation of Canadian cattle would result in the introduction of BSE-infected cattle into the U.S. with "virtual certainty." *Id.* at 10-11. Yet, none of the four diseased cattle, out of a total Canadian cattle population of some 5.5 million, *see* 70 Fed. Reg. at 465, were under 30 months of age; all were 70 to 90 months of age, *see id.*; 70 Fed. Reg. 18252, 18258 (Apr. 8, 2005). Accordingly, the only "certainty" one can derive from the cases of these four cattle is that none of them would have been permitted to be imported had the Final Rule been in effect.

Indeed, because of the lengthy incubation period of BSE, 70 Fed. Reg. at 470, 474 (noting normal range of incubation to be 48 to 60 months), there is no record of any BSE-infected cattle in Canada under the age of 30 months. The district court's conclusion that the Final Rule would lead to the "virtual certainty"

of BSE-infected cattle crossing the border is simply untenable. Rather, as the duration of the Canadian feed ban, instituted in 1997, increases with each passing day, the risk of importing BSE-infected cattle from Canada diminishes.

The district court's second conclusion, that BSE-infected Canadian cattle would pose a "catastrophic risk of danger" to American beef consumers, Op. at 11, is no less hyperbolic. The district court held that the "clear public interest in minimizing the risk of humans contracting [variant Creutzfeldt-Jakob Disease] vCJD" tipped the balance of hardships strongly in favor of banning the importation of Canadian cattle. *Id.* at 26.

Yet there has not been a single instance of vCJD transmitted by Canadian cattle or beef products. *See* 70 Fed. Reg. at 460, 503. Studies of the vCJD incidence in the United Kingdom have shown that transmission to human beings is rare. European scientists have concluded that there is likely a species barrier and that the amount of infected cattle tissue required to infect humans is "10,000 times greater than the amount needed to infect cattle." 70 Fed Reg. at 18259; *see also* 70 Fed. Reg. at 462.

In studies specifically pertaining to the U.S., scientists have concluded that there is a particularly low likelihood of BSE transmission in North America. As USDA explained, an independent assessment of the U.S. BSE risk undertaken by the Harvard Center For Risk Analysis at Harvard University and the Center for

Computational Epidemiology at Tuskegee University, found that "the United States is highly resistant to any amplification of BSE or similar disease" and that "measures taken by the U.S. Government and industry make the United States robust against the spread of BSE to animals or humans." *Id.* at 467.

R-CALF itself acknowledged to this Court, in the related appeal by the National Meat Association, that it "never argued that there was a great risk to human health from [the] resumed imports." R-CALF's Answering Brief, Case No. 05-35214 (9th Cir. Mar. 29, 2005), at 44. The district court's exaggerated estimation of the "catastrophic risk" to human health posed by the Final Rule, an estimation now abandoned even by R-CALF, renders the court's weighing of the relative hardships of a preliminary injunction insupportable. *See Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 869-70 (2d Cir. 1974) (Friendly, J.) (reversing order of preliminary injunction because district court "exaggerated the hardship" to plaintiff and "minimized the hardship" to defendant).

B. The District Court Overstated The Potential Harm To Domestic Cattle Ranchers

In balancing the hardships that might accrue from the Final Rule, the district court also exaggerated the economic harm likely to be suffered by U.S. cattle ranchers if the border were reopened to Canadian cattle under 30 months of age. The court presumed that the importation of Canadian beef would trigger a decrease

in the value of domestic cattle products because "[o]nce the Canadian beef is allowed to intermingle with U.S. meats it will open a flood of speculation" about the quality of U.S. products, resulting in a "stigma [attached] to all U.S. meat." Op. at 25. This stigma, the court found, would severely injure R-CALF. *See id.* at 26.

But the district court's fears about reputational harm are not supported by the facts on the record. Following the discovery in the State of Washington of a Canadian-sourced cow with BSE, no evidence emerged of any domestic stigma attached to U.S. meat. *See* 70 Fed. Reg. at 522. To the contrary, a poll taken by Cattle-Fax showed that domestic beef consumption was consistently strong, and that consumer confidence in the safety of the U.S. beef supply hit a record high. *See id.* As USDA stated, "there were no discernible losses in consumer confidence or demand for domestic beef, and likewise no domestic market share loss to other protein sources in response to [the] single case of BSE in Washington State." *Id.* Evidently, the American public has a surer understanding of the minimal risk posed by Canadian cattle than does the district court. The court's conclusion that the Final Rule would attach a "stigma" to U.S. beef is speculation contradicted by the record and cannot lawfully be grounds for a preliminary injunction against the Final Rule. *See Colorado River Indian Tribes v. Town of Parker,* 776 F.2d 846, 849-50 (9th Cir. 1985) (order of preliminary injunction reversed; "theoretical

harm" and "speculative injury" do not constitute irreparable injury); *Lydo Enter., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1216 (9th Cir. 1984) ("A preliminary injunction is not justified when based mainly on speculation.").

III. THE DISTRICT COURT IGNORED THE HARM TO THE PUBLIC INTEREST OF ENJOINING THE FINAL RULE

The district court opined that there would be no "significant harm to Defendant or to any other party" from an injunction of the Final Rule, saying that such an injunction would simply "maintain[ ] the *status quo ante*" Op. at 26. Yet the court ignored the injunction's artificial inflation in the U.S. cost of beef and its consequent deleterious effect on U.S. public health. The court also ignored the effect that its order would have on U.S. efforts to harmonize international safety standards for beef and to remove current trade barriers to U.S. beef products. In short, the court ignored the preliminary injunction's significant harms to the public interest.

A. The District Court Ignored The Adverse Price Effects Of A Continued Ban On Canadian Cattle Imports.

The district court treated artificially inflated beef prices and the consequent hardship to American consumers as a neutral side effect of the ban on Canadian cattle. As USDA found, the cost of beef in the U.S. today is far higher than before the 2003 ban on the Canadian cattle supply. 70 Fed. Reg. at 520. The court's injunction maintains this effective price-support system, hardly a neutral result for

the American public, particularly for families struggling to meet their nutritional needs. The district court apparently gave no weight to this ill-effect on U.S. public health, despite extensive economic analysis by USDA of the consumer welfare effect of price reductions. *Id.* at 521, 536-40. The district court's disregard of this real hardship to the American public undermines the court's justification for its injunction.

B. The District Court Ignored The Adverse Effect Of Its Injunction On Efforts By The U.S. To Develop Internationally Consistent Safety Standards For Cattle And Beef Products.

The court's injunction thwarts the ongoing effort by the U.S. to achieve consistent and scientifically sound international standards for trade in cattle and beef products. By invalidating the minimal-risk approach that informs the Final Rule, the district court maintained outdated U.S. standards, based on obsolete science and zero-risk tolerances. The American public has a significant interest in relegating these standards to the past, because these same standards are now being deployed to bar U.S. beef products from many of the major markets in the world.

The importance of harmonizing international standards relating to trade in animals and animal products was not lost on Congress when it enacted AHPA. Congress understood that, in a global economy, a "go it alone" approach to animal health and safety would not serve the interests of the American people. It, therefore, made an express finding that protecting the "health and welfare of the

people of the United States" required "cooperation by the Secretary [of Agriculture] with foreign countries." 7 U.S.C. § 8301(5)(B).

The U.S. has taken a leading role in this cooperative enterprise, working to establish a uniform standard internationally that would minimize the risk of BSE and avoid disruptions of trade driven by fear rather than science. *See* 70 Fed. Reg. at 533. For example, the U.S. joined with Mexico and Canada in March 2005, to advance the process of harmonization of BSE-related standards. *See* USDA Release No. 0113.05, April 1, 2005 (reporting on and attaching the Report of the North American Chief Veterinary Officers on Harmonization of a BSE Strategy), *available at* http://www.usda.gov (last viewed April 21, 2005); *see also* 70 Fed. Reg. at 533 (noting that the U.S., Canada, and Mexico have held annual meetings to develop a North American approach to BSE). The U.S. also has actively participated in the development of uniform BSE practices worldwide through the International Office for Epizootic Diseases (OIE). *See* 70 Fed. Reg. at 463-64. The U.S. effort to move beyond the black-and-white of a zero-risk approach to BSE and to urge worldwide adoption of the more nuanced, scientifically supported, minimal-risk approach embodied in the Final Rule suffered a severe setback from the district court's preliminary injunction.

The importance of the harmonization effort to the public interest is evident from the current array of foreign barriers to U.S. beef products. Based on the

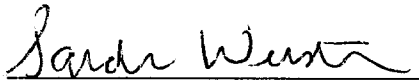
single BSE-infected cow found in the State of Washington, a number of foreign countries closed their markets absolutely to U.S. beef products. U.S. governmental efforts to reopen those markets have stressed the current state of scientific knowledge and the minimal risk of BSE dissemination in light of U.S. countermeasures. *See* U.S. Trade Representative, National Trade Estimate Report on Foreign Trade Barriers, March 30, 2005, at 257 (Hong Kong), 320 (Japan), 364 (Korea), 522 (Russia), *available at* www.ustr.gov (last viewed April 21, 2005).

Although some markets have reopened in recent weeks after more than a year of negotiations, *see* www.usda.gov/wps/portal (last viewed April 21, 2005) (announcing limited reopening of Egyptian and Taiwanese markets), the longstanding U.S. effort to persuade foreign trading partners of the merits of a minimal-risk approach is undermined by the district court's preliminary injunction. *Cf. O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002) (staying preliminary injunction in light of concern that injunction would have "serious consequences for efforts to obtain the assistance of other nations"). The U.S. cattle industry that R-CALF purports to represent, as well as the American public whose interests it purports (under an elastic view of standing) to protect, are hardly well served by a judicial decision that dismisses the scientific advances and safety measures adopted since 2003, in favor of an absolutist approach that considers zero risk to be the only basis for public policy.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated and the judgment of the district court should be reversed.

Respectfully submitted.



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April 21, 2005.

STATEMENT OF RELATED CASES

Amicus Alberta Beef Producers is aware of only one pending related case within the meaning of Ninth Circuit Rule 28-2-6: No. 05-35214. It is an appeal by National Meat Association (NMA) from the district court's preliminary injunction order in this case and from a separate order denying NMA's motion to intervene.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, I hereby certify that the foregoing *amicus* brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,810 words, excluding those portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii).

Sarah Weinstein

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2005, I served two copies of the foregoing motion and *amicus* brief by overnight delivery and electronic mail on the parties herein, at the following addresses:

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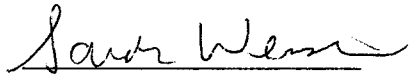

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